

Against the Grain

Volume 28 | Issue 3

Article 33

2016

Questions and Answers--Copyright Column

Laura N. Gasaway

University of North Carolina- Chapel Hill School of Law, laura_gasaway@unc.edu

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Recommended Citation

Gasaway, Laura N. (2018) "Questions and Answers--Copyright Column," *Against the Grain*: Vol. 28: Iss. 3, Article 33.

DOI: <https://doi.org/10.7771/2380-176X.7379>

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Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~uncldg/gasaway.htm

QUESTION: *A public librarian asks for clarification about the latest in the Authors Guild v. Google case.*

ANSWER: In April the U.S. Supreme Court declined to review the case. So, **Google**, the “case that will not die” has finally met its end. Initiated in 2005, the case has continued with multiple decisions and appeals. (For a brief history of the case, consult Wikipedia). In November 2013, the Second Circuit U.S. Court of Appeals dismissed the **Authors Guild’s** challenge to **Google’s** use of copyrighted works finding that such use was fair use. On remand, **Judge Denny Chin** said of the **Google Books Project** that it: (1) provides significant benefits to the public; (2) advances the progress of the arts and sciences; (3) maintains respectful consideration for the rights of authors and other copyright owners; and (4) does not adversely impact the rights of copyright holders. The Second Circuit unanimously affirmed this judgment in December 2014 following an appeal by the **Authors Guild**. The court found that: (1) the digitization of copyrighted works, the search functionality and the display of snippets only is transformative; (2) such activity does not provide a market substitute for the original; (3) the for-profit nature of **Google’s** business does not negate fair use; and (4) **Google’s** provision of digitized infringement to the libraries that provided the books is not infringement because it is done so with the understanding that the libraries will use the copies in a manner consistent with the copyright law.

In December 2015 the **Authors Guild** appealed. The U.S. Supreme Court’s denial of *certiorari* means that the Second Circuit opinion in favor of **Google** stands, and the case is over.

QUESTION: *A high school librarian asks about an upcoming musical performance at a student talent show at her school. The show will not be broadcast or streamed and it is held on private school property, but admission tickets are sold. Some parents/friends will likely record on phones or hire private videographers.*

One of the female performers would like to slightly alter the pronouns to a Bruno Mars pop song “When I was your Man.” She would like to change original pronouns “she, her, woman” and sing “he, him, man” etc., and, “When YOU were my man.” Would this be considered an acceptable adaption or an infringement?

ANSWER: The change in the lyrics described is very minor and is not much of a problem. When pop stars make music recordings of other people’s songs, they obviously pay royalties (called the mechanical license), but they also get the right to make an arrangement

of the song which likely has included minor changes in the lyrics to fit the singer. While the school’s talent show is not making a record, it is likely that the alterations are so minor that no music owner would ever complain.

In fact, there are often shows at schools where all of the lyrics are changed in a song. While this is certainly a technical infringement of copyright, there are no complaints about these performances. **Weird Al Yankovic** actually gets permission for his lyrics to popular songs, but he is changing everything, makes a recording and sells that for commercial purposes.

QUESTION: *A college faculty member asks about copying extensively from his own works. Must he seek permission of the publisher in order to do this?*

ANSWER: This is an area in which an intuitive answer may be wrong. It seems sensible that one could copy extensively from a work he has written, but it actually depends on who owns the copyright. If the author retained the copyright and transferred to the publisher only the right to publish and distribute the work, or if he retained the right to reproduce for his own use, then the author may copy from the work as described. If he transferred the reproduction right to the publisher, then that right belongs to the publisher and permission must be sought.

Certainly, reproducing a fair use portion is still permitted but the question uses the qualifier “extensively” which denotes that it is greater than a fair use portion.

QUESTION: *Are middle school writing assignments and student learning outcome assessment templates copyright protected?*

ANSWER: Yes, these works are copyrighted unless they are developed by federal government agency. If they are developed by a state agency, the answer is less clear since some states actually claim copyright in some of the works they produce. If a private company developed the assignments and assessment templates, they are copyrighted; however, they may also be licensed for use by the school.

Student responses on writing assignments are also copyrighted, and the rights are owned by the student. This means that if a teacher wants to post student assignments on the web, the teacher should seek the student’s permission for such displays of their works. This can be easily accomplished with a blanket permission signed at the first of each term.

QUESTION: *Does the latest decision in the Georgia State University case mean that libraries can reproduce works for electronic reserves and for course management systems without seeking permission?*

ANSWER: No, libraries and faculty members should still apply the fair use test to determine whether reproducing a portion of a work for e-reserves or to place in a course management system is fair use. The recent opinion by the district court (on remand from the 11th Circuit U.S. Court of appeals) may or may not be the final word on this case. In other words, the plaintiffs still may appeal the court’s decision.

The federal district court reconsidered the case as directed by the circuit court of appeals. (For full text of the opinion, see http://policynotes.arl.org/wp-content/uploads/2016/03/DKT-No.-510-Order-dated-2016_03_31.pdf.) The court originally found five instances of infringement of 74 excerpts at issue in the case. The court of appeals vacated this decision and sent the case back to the same judge in the district court with instructions on how better to apply the fair use test. The earlier decision said that use for e-reserves is not transformative, and the circuit court did not challenge that holding. The decision’s new fair use analysis is intended for situations where the use is not transformative. (1) The purpose and character of the use continues to favor nonprofit educational use. (2) The nature of the work must be examined for each excerpt, and here the judge found that the mix of information and commentary in the excerpts favored neither party. (3) For the third factor, amount and substantial used, the judge applied appropriateness of the amount of the excerpt to the fair use purpose and its potential to substitute for purchase of the work. (4) Market effect is the most important factor in the judge’s decision.

For that factor, the judge focused on both actual harm to the potential market for the work and on harm to the value of the work. Moreover, the judge stated that this fourth fact should comprise 40% of the fair use analysis. The analysis would examine sales of the work over time as well as the amount of revenue derived from licensing reproductions. If there is little demand for excerpts, “the likelihood of repetitive unpaid use is diminished.”

Of the 48 excerpts remaining after the earlier decision, the judge found that only four were not fair use. 🍀

